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#### ORDINANCE NO. 3534

AN ORDINANCE OF THE CITY OF EDMONDS, WASHINGTON, GRANTING TO NEW CINGULAR WIRELESS PCS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, A MASTER USE AGREEMENT, TO INSTALL, OPERATE, AND MAINTAIN WIRELESS COMMUNICATION FACILITIES WITHIN A CERTAIN DESIGNATED PUBLIC RIGHT-OF-WAY OF THE CITY OF EDMONDS, STATE OF WASHINGTON, PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS, AND CONDITIONS WITH RESPECT THERETO, AND ESTABLISHING AN EFFECTIVE DATE.

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WHEREAS, New Cingular Wireless PCS, LLC, a Delaware limited liability company, (“Cingular Wireless” or “Permittee”) has requested that the City of Edmonds (“City”) grant it the right to install, operate, and maintain wireless communication facilities (“Communication Facilities,” as further defined hereunder) within the public ways of the City; and

WHEREAS, the City Council has found it desirable for the welfare of the City and its residents that a Master Use Agreement (“Agreement”) to address the installation of multiple Communication Facilities in the public ways be granted to Cingular Wireless, and

WHEREAS, the City Council has the authority under RCW 35A.47.040 and RCW Ch. 35.99 to grant such Master Use Agreement and any appropriate installation and maintenance permits (“Permits,” as further defined hereunder) as may be required to address the installation

and maintenance of specific Communication Facilities in the streets and other public properties of the City; and

WHEREAS, the City is willing to grant the rights requested subject to certain terms and conditions, NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF EDMONDS, WASHINGTON, DO ORDAIN  
AS FOLLOWS:

Section 1. Definitions. For the purposes of this Master Use Agreement, the following terms, phrases, words, and abbreviations shall have the meanings ascribed to them below. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number and words in the singular number include the plural number.

a. “Affiliate” means an entity which owns or controls, is owned or controlled by, or is under common ownership with the Permittee.

b. “City” means the City of Edmonds, Washington.

c. “Communication Service” shall mean any telecommunications services, telecommunications capacity, or dark fiber, provided by the Permittee using its Communication Facilities, either directly or as a carrier for its subsidiaries, Affiliates, or any other person engaged in telecommunication services, including, but not limited to, the transmission of voice, data or other electronic information, facsimile reproduction, burglar alarm monitoring, meter reading and home shopping, or other subsequently developed technology which carries an electronic signal over fiber optic cable. However, Communications Service shall not include the provision of cable television, open video, or similar services, as defined in the Communications Act of 1934, as amended, for which a separate permit would be required.

d. “Communication Facility,” “Communication Facilities,” “Facility” or “Facilities” shall mean the Permittee’s (or other valid Permit holder’s) wireless communications installations and attendant structures constructed and operated within the City’s Public Way (as defined below), and shall include all cables, wires, conduits, ducts, pedestals, and any associated converter, equipment, or other facilities within the City’s Public Way, designed and constructed for the purpose of providing Communication Service. This definition shall include such facilities as initially installed and any additional facilities as are approved pursuant to Chapter 20.50, Wireless Communications Facilities, of the Edmonds Community Development Code and which are allowed pursuant to an associated Right-of-Way Construction Permit, as defined below.

e. “Right-of-Way Construction Permit” and “Street Use Permit” or “Permit” shall mean that permit required of Cingular Wireless by the City in order to (i) install new Facilities, (ii) perform routine maintenance activities as to existing Facilities, or (iii) to acknowledge Permittee’s access to its Facilities after the fact, immediately following resolution of emergencies having necessitated Permittee’s immediate access of its existing Facilities, within the public ways of the City, pursuant to EMC Chapter 18.60. Upon issuance of each Permit by the City in accordance with this section, the parties shall attach to this Agreement a copy of each said Permit (in the standard form attached hereto as **Exhibit “A,”** and which is incorporated herein by this reference). In the event of conflict, the provisions of this agreement shall control.

f. “FCC” means the Federal Communications Commission, or any successor federal governmental entity hereto.

g. “Permittee” means Cingular Wireless, or the lawful successor, transferee, or assignee thereof.

h. “Person” means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity.

i. “Public Way” shall mean the surface of, and any space above or below, any public street, highway, freeway, bridge, path, alley, court, boulevard, sidewalk, parkway, lane, drive circle, or other public right-of-way, including, but not limited to, public utility easements, utility strips, or rights-of-way dedicated for compatible uses and any temporary or permanent fixtures or improvements located thereon now or hereafter held by the City which shall entitle the City and the Permittee the use thereof for the purpose of installing, operating, repairing, upgrading, and maintaining the Communication Facilities. Public Way also shall mean any easement now or hereafter held by the City for the purpose of public travel, or for utility or public service use dedicated for compatible uses, and shall include other easements or rights-of-way as shall within their proper use and meaning entitle the City and the Permittee to the use thereof for the purposes of installing or transmitting the Permittee’s Communication Service over poles, wires, cable, conductors, amplifiers, appliances, attachments, and other property as may be ordinarily necessary and pertinent to the Communication Facilities.

Section 2. Authority Granted. The City hereby grants to the Permittee, its heirs, successors, legal representatives, and assigns, subject to the terms and conditions hereinafter set forth, the right, privilege, and authority to construct, reconstruct, upgrade, expand, operate, maintain, replace, and use all necessary equipment necessary for the operation of Permittee’s Communication Facilities. However, the Permittee is only authorized to place its Communication Facilities in, under, on, across, over, through, along, or below the Public Way of the City described in Exhibit “A” hereto.

### Section 3. Construction Right-of-Way Use Permits Required

A. Prior to site-specific location and installation of any portion of its Communication Facilities within a Public Way, the Permittee shall apply for and obtain a Right-of-Way Construction Permit and a Street Use Permit pursuant to EMC Chapter 18.60 and 18.70. In some situations, new or replacement structures may be required to obtain a Conditional Use Permit depending on their size and location.

B. The Permittee shall file plans or maps with the City showing the proposed location of its Communication Facilities and pay all duly established Right-of-Way Construction and Street Use Permit and inspection fees associated with the processing of the Permits. In no case shall any work commence within any Public Way without said Permit, except as otherwise provided in this Master Use Agreement.

Section 4. Grant Limited to Occupation. Nothing contained herein shall be construed to grant or convey any right, title, or interest in the Public Ways of the City to the Permittee, nor shall anything contained herein constitute a warranty of title.

Section 5. Term of Master Use Agreement. The term of this Master Use Agreement shall be for a period of five (5) years from the date of acceptance as set forth in Section 32, unless sooner terminated. This Master Use Agreement shall automatically renew for three (3) additional five (5) year terms for a maximum total of twenty (20) years unless the Permittee notifies the City in writing of its intention not to renew this Agreement at least thirty (30) days prior to the expiration of the then-current term.

Section 6. Non-Exclusive Grant. This Agreement shall not in any manner prevent the City from entering into other similar agreements or granting other or further master use agreements, Right-of-Way Use Permits, or franchises in, under, on, across, over, through, along or below any of said Public Ways of the City. However, the City shall not permit any such future permittee or franchisee to interfere with the operations of Permittee's Communication Facilities. In the event that such interference or disruption occurs, the Community Services Director and the Permittee shall work cooperatively to eliminate or substantially mitigate such interference or disruption. In case of interference between two wireless carriers, the City shall give priority to the wireless carrier that first applied to locate its Facility at the subject location. Further, this Agreement shall in no way prevent or prohibit the City from using any of its Public Ways or affect its jurisdiction over them, or any part of them, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of the same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new Public Ways, all in compliance with Section 7, below.

### Section 7. Relocation of Communication Facility.

A. The Permittee agrees and covenants to protect, support, temporarily disconnect, relocate, or remove from any Public Way any portion of its Communication Facilities when so

required by the Community Services Director by reason of traffic conditions, public safety, dedications of new Public Ways and the establishment and improvement thereof, widening and improvement of existing Public Ways, street vacations, freeway construction, change or establishment of street grade, or the construction of any public improvement or structure by any governmental agency acting in a governmental capacity; provided that the Permittee shall in all cases have the privilege to temporarily relocate, in the authorized portion of the same or similar Public Way upon approval by the Community Services Director, any Facility required to be temporarily disconnected or removed.

In order to facilitate the design of City street and right-of-way improvements, the Permittee agrees, upon the reasonable request of and at least thirty (30) days notice from the Community Services Director at its sole cost and expense to locate and, if reasonably determined necessary by the City, to excavate and expose portions of its Communication Facilities for inspection so that the location of same may be taken into account in the improvement design; PROVIDED that, Permittee shall not be required to excavate and expose its Facilities unless the Permittee's as-built plans and maps of its Facilities submitted pursuant to Section 8 of this Agreement are reasonably determined by the Community Services Director to be inadequate for purposes of this paragraph. The decision to require relocation of said Facilities in order to accommodate the City's improvements shall be made by the Community Services Director upon review of the location and construction of the Permittee's Facilities.

If the Community Services Director reasonably determines that the project necessitates the relocation of one or more of the Permittee's then existing Facilities, the following shall apply:

1. In non-emergency circumstances, the City shall within a reasonable time, which shall be no less than ninety (90) days, prior to the commencement of such improvement project, provide the Permittee with written notice requiring such relocation. In the event that such relocation requires land use approvals by the City, such notice period shall be extended by an additional ninety (90) days. As part of such notice, the City shall provide the Permittee with copies of information for such improvement project. The City and Permittee shall immediately meet and work cooperatively to identify reasonable alternative locations for the Permittee's facilities from which the Permittee determines that it can provide substantially similar service to that provided from the original location, so that the Permittee may relocate its Facilities to another location in the Public Way that accommodates the improvement project. The City shall make a diligent effort to process any permits required for a replacement Facility in a timely fashion to enable the Permittee to construct a replacement Facility before the Permittee is required to remove the original Facility. The Permittee shall complete relocation of its Facilities so as to accommodate the improvement project at least ten (10) days prior to commencement of the improvement project.
2. In the event of an emergency posing a threat to public safety, health or welfare, or in the event of an emergency beyond the control of the City and which will result in

severe financial consequences to the City, the City shall give the Permittee written notice to relocate as soon as practicable. As part of such notice, the City shall provide the Permittee with copies of information for such improvement project and shall identify an alternative location for the Permittee's Facilities from which the Permittee can provide substantially similar service to that provided from the original location, so that the Permittee may relocate its Facilities to another location in the Public Ways that accommodates the improvement project. The City shall make a diligent effort to process any permits required by the City for a replacement Facility in a timely fashion to enable the Permittee to construct any replacement Facility before the Permittee is required to remove the original Facility. The Permittee shall relocate its Facilities within a reasonable time period specified by the Community Services Director.

In all circumstances, the Permittee may, after receipt of written notice requesting a relocation of its Facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise the Permittee in writing if one or more of the alternatives are suitable to accommodate the work which would otherwise necessitate relocation of the Facilities. If so requested by the City, the Permittee shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by the Permittee full and fair consideration, within a reasonable time, so as to allow for the relocation work to be performed in a timely manner. In the event the City ultimately determines after due consideration, that there is no other reasonable alternative, the Permittee shall relocate its Facilities as otherwise provided in this Section. Furthermore, unless otherwise provided in RCW 35.99.060, the Permittee shall complete relocation of its Facilities at no charge or expense to the City.

The provisions of this Section shall in no manner preclude or restrict the Permittee from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity other than the City, where the Facilities to be constructed by said person or entity are not or will not become City-owned, operated or maintained Facilities; provided that such arrangements do not unduly delay a City construction project.

B. Except as provided in Section 17, the Permittee will indemnify, hold harmless, and pay the costs of defending the City against any and all claims, suits, actions, damages, or liabilities for delays on City construction projects caused by or arising out of the failure of the Permittee to relocate its Facilities as required by this Section; provided, that the Permittee shall not be responsible for damages due to delays caused by the City or circumstances beyond the control of the Permittee.

C. The parties understand that the relocation of Facilities placed in the right-of-way is partially governed by RCW 35.99, et.al., and to the extent that the provisions of this section are not in compliance with the terms of RCW 35.99 et.al. (or successor statute), the provisions of the statute shall control and the terms of this section shall be amended to be in conformance thereto.

Section 8. The Permittee's Maps and Records. After construction is complete, the Permittee shall provide the City with accurate copies of all as-built plans and maps in a form and content prescribed by the Community Services Director. These plans shall be provided at no cost to the City, and shall include hard copies and digital copies in a format specified by the Community Services Director.

Section 9. Work in Public Ways. During any period of relocation, construction, or maintenance, all surface structures, if any, shall be erected and used in such places and positions within said Public Ways and other public properties so as to interfere as little as reasonably possible with the free passage of traffic and the free use of adjoining property. The Permittee shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or the laws of the State of Washington, including RCW 39.04.180 for the construction of trench safety systems.

During the progress of the work, the Permittee shall not unnecessarily obstruct the passage of proper use of the Public Ways, and all work by the Permittee in the area covered by this Agreement and as described in this Section shall be performed in accordance with City of Edmonds Public Works Construction Standards.

If either the City or the Permittee shall at any time after the initial installation of the Facilities plan to make excavations in area covered by this Agreement and as described in this Section, the party planning such excavation shall afford the other, upon receipt of written request to do so, an opportunity to share such an excavation. PROVIDED THAT:

- A. Such joint use shall not unreasonably delay the work of the party causing the excavation to be made or unreasonably increase its costs;
- B. Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties;
- C. Either party may deny such request for safety reasons or if their respective uses of the trench are incompatible, and
- D. Such joint use shall not interfere with the operation of the Communication Facility.

The joint use provisions of this Section shall apply only to joint use by the City and the Permittee. Nothing in this Section is intended to require the Permittee to afford other similar users the opportunity to share the Permittee's excavations.

Section 10. Restoration after Construction. The Permittee shall, after installation, construction, relocation, maintenance, upgrading, improvement, removal, or repair of its Communication Facilities within the Public Ways, restore the surface of said Public Ways and

any other City-owned property which may be disturbed by the work, to the same condition the Public Way or City-owned property was in immediately prior to any such installation, construction, relocation, maintenance, upgrading, improvement, or repair, except for the Facility or Facilities and reasonable wear and tear ("Restoration Work"). All survey monuments which are to be disturbed or displaced by such work shall be referenced and restored, as per WAC 332-120, as the same now exists or may hereafter be amended, and all pertinent federal, state and local standards and specifications. The Permittee agrees to promptly complete all Restoration Work and to promptly repair any damage caused by such work to the Public Ways or other affected area at its sole cost and expense according to the time and terms specified in the Right-of-Way Construction Permit issued by the City, all in accordance with the applicable provisions of the Edmonds City Code, as the same now exists or as it may hereafter be amended or superseded.

Section 11. City Inspection of Permittee's Construction Work. The City shall inspect all of Permittee's work in the Public Ways within 60-days of completion of any installation, relocation, maintenance, upgrading, improvement, removal and/or repair of its Facilities or any Restoration Work (collectively "Construction Work") for compliance with the City's construction standards as set forth in the Edmonds City Code, as the same now exists or as it may hereafter be amended or superseded. The City shall promptly notify the Permittee of any patent defect or failing in its Construction Work. If City fails to inspect the Construction Work within sixty (60) days, the City shall be deemed to have waived any rights with regard to patent defects.

Section 12. Emergency Work – Right-of-Way Use Permit Waiver. In the event of any emergency in which any of the Permittee's Communication Facilities located in, above, or under any public way breaks, are damaged, cease to provide service, or if the Permittee's construction area is otherwise in such a condition as to immediately endanger the property, life, health, or safety of any individual, the Permittee shall immediately take the proper emergency measures to repair its Facilities, to cure or remedy the dangerous conditions for the protection of property, life, health, or safety of individuals without first applying for and obtaining a Right-of-Way Use Permit as otherwise required under this Agreement; PROVIDED that, the Permittee shall notify the City by telephone promptly upon learning of the emergency and shall apply for all required Permits not later than the fifth (5th) succeeding day during which the Edmonds City Hall is open for business.

Section 13. Dangerous Conditions, Authority for City to Abate. Whenever construction, installation, or excavation of the communication Facilities authorized by this Agreement has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining public way, street, or public place, or endangers the public, street utilities, or City-owned property, the Community Services Director may reasonably require the Permittee, at the Permittee's own expense, to take action to protect the public, adjacent public places, City-owned property, streets, utilities, and Public Ways. Such action may include compliance within a reasonably prescribed time.



In the event that the Permittee fails or refuses to timely take the actions directed by the City, or fails to fully comply with such directions, or if emergency conditions exist which require immediate action, the City may, after providing the Permittee reasonable notice and a reasonable opportunity to cure, enter upon the property and take such actions as are necessary to protect the public, the adjacent streets, utilities, Public Ways, to maintain the lateral support thereof, or actions regarded as necessary safety precautions; and the Permittee shall be liable to the City for the reasonable costs thereof.

Section 14. Recovery of Costs. The Permittee shall be subject to all and Right-of-Way Use Permit fees associated with activities undertaken through the authority granted in this Agreement or under the laws of the City. Where the City incurs costs and expenses for review, inspection, or supervision of activities undertaken pursuant to the authority granted in this Agreement, the Permittee shall reimburse the City directly for any and all reasonable costs within ninety (90) days after receipt of an itemized bill.

In addition to the above, the Permittee shall reimburse the City for any and all reasonable costs the City incurs responding to an emergency involving the Permittee's Communication Facilities, consistent with to Section 13, within ninety (90) days after receipt of an itemized bill.

The time of City employees shall be charged at their respective rate of salary, including overtime if applicable, plus benefits. All billings will be itemized as to specifically identify the costs and expenses for each project for which the City claims reimbursement. The billing may be on an annual basis, but the City shall provide the Permittee with the City's itemization of costs at the conclusion of each project for information purposes.

Section 15. Annual Compensation for Use of the Right-of-way under this Master Use Agreement:

- A. For the purposes of this section, "New Support Structure(s)" means a monopole, lattice tower, or similar structure erected solely for the purpose of installation of wireless antennas in the Right-of-Way where previously no similar structure had existed.
- B. For the purposes of this section, "Existing Support Structure(s)" means existing utility poles, light poles or other similar approved structures that exist in the Right-of-Way that can be used to support wireless antennas.
- C. For the purposes of this section, "Replacement Structure(s)" means a structure that is similar to an Existing Support Structure, but either taller and/or stronger than a Existing Support Structure, and which replaces an Existing Support Structure for purposes of placement of wireless antennas.
- D. The compensation provided for in Subsection "G," below, shall be adjusted annually beginning January 1, 2006 to the extent of any percentage change which occurred in the Consumer Price Index Urban (CPI-U) (All Items, Base 1982-84 = 100)

as published by the United States Department of Labor, Bureau of Labor Statistics ("BLS") for All Consumers of the Seattle-Tacoma-Bremerton Area for the annual period ending in June of the preceding year. If the BLS changes the indexing region during the term of this Master Use Agreement, annual adjustments will be based on the region geographically closest to the Seattle-Tacoma-Bremerton Region.

E. The payment for any partial year shall be prorated. The Permittee's payment obligation for any Facility shall not begin until the Permittee has begun construction of that Facility. Upon initiating construction, the Permittee shall pay the City the prorated amount due for the remainder of the calendar year. For each year following the year in which the Facility is constructed, the Permittee shall pay the City on an annual basis for the Facility. Such payment shall be due no later than January 15th of each year.

F. In the event that any of the Permittee's Facilities are out of service due to a relocation pursuant to Section 7, the City shall grant the Permittee a credit equal to the prorated value of the time the Facility or Facilities are out of service against the subsequent year's compensation.

G. In consideration for the use of the Public Ways, Permittee shall commit to providing an annual payment for each approved Facility reflected on the attached Exhibit "A." The amount of the annual payment shall be as follows:

1. Antennas placed on a New Support Structure, with equipment cabinets located within the Right-of-Way, annual payment is Five Thousand Dollars (\$5,000).
2. Antennas placed on an Existing Support Structure or Replacement Structure, with equipment cabinet or other associated equipment located within the public Right-of-Way, annual payment is Three Thousand Dollars (\$3,000).
3. Antennas placed on an Existing Support Structure or Replacement Structure, where no equipment cabinet or other associated equipment is located within the public Right-of-Way, annual compensation is Two Thousand Dollars (\$2,000).

H. The Permittee's payment obligation with regard to any Facility shall terminate upon removal of that Facility from the Public Way. The City shall refund to the Permittee, within 60 days of receiving notice of removal from the Permittee and confirmation of restoration to City standards, as applicable, from the City Engineer, the prorated portion of the annual payment for each Facility removed by Cingular pursuant to Section 7.

Section 16. Grant Fee. As additional consideration for the right and privileges granted hereunder, the Permittee agrees to pay, at the time of acceptance of this Agreement, a one time

grant fee of Five Hundred Dollars (\$500.00) to defray the City's legal and administrative costs and expenses associated with negotiating and approving this Master Use Agreement, provided that such expenses shall not be included in the reimbursement provisions set forth in Section 13 of this Agreement.

Section 17. Indemnification.

A. Permittee hereby agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person arising from injury, sickness, or death of any person or damage to property:

1. For which the negligent acts or omissions of Permittee, its agents, servants, officers or employees in performing the activities authorized by this Master Use Agreement are the proximate cause;
2. Based on the City's inspection or lack of inspection of work performed by Permittee, its agents and servants, officers or employees in connection with work authorized on the Public Ways or property over which the City has control pursuant to this Agreement or pursuant to any other site-specific Permit or other approval issued in connection with this Agreement;
3. Arising as a result of the negligent acts or omissions of Permittee, its agents, servants, officers or employees in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction, or work upon the Public Ways, in any public way, or other public place in performance of work or services permitted under this Agreement.

B. The provisions of Subsection "A" of this Section shall apply to claims by Permittee's own employees and the employees of the Permittee's agents, representatives, contractors, and subcontractors to which Permittee might otherwise be immune under Title 51 RCW. This waiver of immunity under Title 51 RCW has been mutually negotiated by the parties hereto, and Permittee acknowledges that the City would not enter into this Agreement without Permittee's waiver thereof.

C. Inspection or acceptance by the City of any work performed by the Permittee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Provided that Permittee has been given prompt written notice by the City of any such claim, said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised with Permittee's consent prior to the culmination of any litigation or the institution of any litigation. The City has the right to defend or participate in the defense of any such

claim, and has the right to approve any settlement or other compromise of any such claim, provided that Permittee shall not be liable for such settlement or other compromise unless it has consented thereto.

D. In the event that Permittee refuses the tender of defense in any suit or any claim, said tender having been made pursuant to this Section, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to the matter), to have been a wrongful refusal on the part of the Permittee, then Permittee shall pay all of the City's costs for defense of the action, including all reasonable expert witness fees, reasonable attorney's fees, and the reasonable costs and fees to City associated with recovering under this Subsection.

E. The obligations of Permittee under the indemnification provisions of this Section shall apply regardless of whether liability for damages arising out of bodily injury to persons or damages to property were caused or contributed to by the City, its officers, agents, employees or contractors except to the extent that such claims, actions, damages, costs, expenses, and attorneys fees were caused by the negligence or any willful or malicious action on the part of the City, its officers, agents, employees or contractors. In the event that a court of competent jurisdiction determines that this Agreement is subject to the provisions RCW 4.24.115, the parties agree that the indemnity provisions hereunder shall be deemed amended to conform to said statute and liability shall be allocated as provided therein.

F. Notwithstanding any other provisions of this Section, Permittee assumes the risk of damage to its Communication Facilities located in the Public Ways and upon City-owned property from such activities conducted by the City, its officers, agents, employees and contractors, except to the extent any such damage or destruction is caused by or arises from the negligence or any willful or malicious action on the part of the City, its officers, agents, employees or contractors. Permittee further agrees to indemnify, hold harmless and defend the City against any claims for damages, including, but not limited to, business interruption damages and lost profits, brought by or under users of Permittee's Facilities as the result of any interruption of service due to damage or destruction of Permittee's Facilities caused by or arising out of activities conducted by the City, its officers, agents, employees or contractors, except to the extent any such damage or destruction is caused by or arises from the negligence or any willful or malicious actions on the part of the City, its officers, agents, employees or contractors.

G. City shall indemnify, save harmless and defend Cingular Wireless from and against any and all injury, loss, damage or liability (or any claims in respect of the foregoing), and costs or expenses (including reasonable attorneys' fees and court costs) arising directly out of the sole negligence or tortious acts of the city or its employees or agents.

Section 18. Insurance. The Permittee shall procure and maintain insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to the Permittee, its agents, representatives or employees. The Permittee shall provide to the City an insurance certificate naming the City as an additional insured for its inspection prior to the commencement of any work or installation of any Facilities pursuant to this Agreement. Such insurance certificate shall evidence:

A. Comprehensive general liability insurance, written on an occurrence basis, including contractual liability coverage, with limits not less than:

- (1) \$2,500,000.00 for bodily injury or death to each person; and
- (2) \$2,500,000.00 for property damage resulting from any one accident.

B. Automobile liability for owned, non-owned and hired vehicles with a limit of \$2,500,000.00 for each person and \$2,500,000.00 for each accident.

C. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$1,000,000.00.

The liability insurance policies required by this Section shall be maintained by the Permittee throughout the term of this Agreement, and such other period of time during which the Permittee is operating without a Right-of-Way Use Permit hereunder, or is engaged in the removal of any of its Communication Facilities from the right of way. Payment of deductibles and self-insured retentions shall be the sole responsibility of the Permittee. The insurance certificate required by this Section shall contain a clause stating that the coverage shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability. The Permittee's insurance shall be primary insurance with respect to the City. Any insurance maintained by the City, its officers, officials, employees, consultants, agents, and volunteers shall be in excess of the Permittee's insurance and shall not contribute with it.

In addition to the coverage requirements set forth in this Section, the insurance certificate required by this Section shall contain language which provides that the policy may not be canceled, reduced in coverage, nor the intention not to renew be stated until at least thirty (30) days after receipt by the City of written notice of the same via U.S. mail. Within fifteen (15) days after receipt by the City of said notice, and in no event later than five (5) days prior to said cancellation or non-renewal, the Permittee shall obtain and furnish to the City replacement insurance certificate(s) meeting the requirements of this Section.

The parties shall meet in the tenth (10th) year to revisit and revise the insurance levels. The revised insurance levels shall be consistent with levels required for similarly situated

franchisees and right-of-way permittees of the City and shall be consistent with generally accepted insurance levels required by other cities and counties of right-of-way permittees in the Puget Sound region.

Section 19. Abandonment and Removal of the Permittee's Communication Facilities.

Upon the expiration, termination, or revocation of the rights granted under this Agreement, the Permittee shall remove all of its Communications Facilities from the Public Ways of the City within ninety (90) days of receiving written notice from the Community Services Director requesting that the Permittee remove its Facilities. Provided, however, that the City may permit the Permittee's improvements to be abandoned in place and/or replaced in such a manner as the parties shall agree, subject always to the City's standard construction requirements for Right-of-Way use. Upon permanent abandonment, and Permittee's agreement to transfer ownership of any Communication Facilities to the City, the Permittee shall submit to the City a proposal and instruments for transferring ownership to the City. Any such Facilities abandoned in place without City's consent and not removed within ninety (90) days of receipt of written notice thereof shall automatically become the property of the City, unless Permittee is prevented from removing its Facilities by causes beyond its reasonable control including, but not limited to, acts of God, war, or governmental restrictions. In such case, Permittee's time for performance of its obligations under this section will be extended by a reasonable period of time, not to exceed an additional thirty (30) days in any event, without City's consent thereto. Provided, however, that nothing contained within this Section shall prevent the City from compelling the Permittee to remove any such Facilities through judicial action when the City has not consented to the Permittee's abandonment of said Facilities in place.

Section 20. Construction Bond. Before undertaking any of the work, installation, improvements, construction, repair, relocation or maintenance authorized by this Agreement, the Permittee shall furnish a street repair or sidewalk bond written by a corporate surety reasonably acceptable to the City equal to at least 125% of the estimated cost of restoring the Public Ways of the City to the pre-construction condition required by Section 11 of this Agreement. Said bond shall be required to remain full force and shall warrant all such Restoration Work for a period of sixty (60) days with regard to any patent defects, and for a period of one (1) year with regard to any latent defects, after completion of the construction of Permittee's Communication Facilities and other improvements in the Public Ways of the City. In the event that a bond issued to meet the requirements of this Section is canceled by the surety, after proper notice and pursuant to the terms of said bond, Permittee shall, prior to expiration of said bond, be responsible for obtaining a replacement bond which complies with the terms of this Section.

Section 21. Modification. The City and the Permittee hereby reserve the right to alter, amend or modify the terms and conditions of this Agreement upon the written agreement of both parties to such alteration, amendment or modification. Said modifications shall be approved by the City by ordinance and accepted by the Permittee consistent with Section 32 hereof.

Section 22. Forfeiture and Revocation. If the Permittee willfully violates or fails to comply with any of the material provisions of this Agreement, or through willful misconduct or

gross negligence fails to heed or comply with any notice given the Permittee by the City under the provisions of this Agreement, then following written notice from the City and reasonable opportunity to cure the alleged violations or failures, the Permittee shall, at the election of the City Council, forfeit all rights conferred hereunder and this Agreement may be revoked, terminated or annulled by the City Council after a hearing held upon reasonable written notice to Permittee. The City Council may decide, after consideration of the reasons for the Permittee's failure to comply with this Agreement, to allow the Permittee additional time to cure before such termination or revocation. The City may elect, in lieu of the above, and without prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling the Permittee to comply with the provisions of this Agreement and to recover its reasonable, documented damages and costs incurred by the City as a direct result of the Permittee's failure to comply with the terms of this Agreement.

Section 23. City Ordinances and Regulations. Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate ordinances made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control by appropriate regulations the locations, elevation, manner or construction and maintenance of any Facilities by the Permittee, and the Permittee shall promptly conform with all such regulations in effect at the time Permittee submits a complete application to the City to install its Facilities, unless compliance would cause the Permittee to violate other requirements of the law.

Section 24. Survival. All of the provisions, conditions, and requirements of this Agreement shall be in addition to any and all other obligations and liabilities the Permittee may have to the City at common law, by statute, or by contract. The provisions, conditions, and requirements of Sections 7, Relocation of Communication System; 9, Work in Public Ways; 10, Restoration after Construction; 13, Dangerous Conditions, Authority for City to Abate; 17, Indemnification and Waiver; 18, Insurance; and 19, Abandonment and Removal of the Permittee's Communication Facilities, shall survive the expiration or termination of this Master Use Agreement, and any renewals or extensions thereof, and remain effective until such time as the Permittee removes its Communication Facilities from the Public Ways, transfers ownership of said Facilities to a third-party, or abandons said Facilities in place, all as provided herein. All of the provisions, conditions, regulations and requirements contained in this Agreement shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of the Permittee; and all privileges, as well as all obligations and liabilities of the Permittee shall inure to its heirs, successors, and assigns equally as if they were specifically mentioned wherever the Permittee is named herein.

Section 25. Severability. In any section, sentence, clause, or phrase of this Agreement should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause, or phrase of this Agreement.

Section 26. Assignment. This Agreement may not be assigned or transferred without the written approval of the City, such approval not to be unreasonably withheld, conditioned, or delayed, except that the Permittee may freely assign this Agreement without any required approval from the City, in whole or part, to any parent, subsidiary, or affiliated corporation, or to an entity with or into which the Permittee may merge or consolidate, or to any entity resulting from the reorganization of the Permittee or parent company, or to any purchaser of all or substantially all of the assets of the Permittee, or as part of any corporate financing, reorganization, or refinancing. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. The Permittee shall provide prompt, written notice to the City of any such assignment.

Further, the Permittee may, without the prior approval of the City: (i) lease the Facilities, or any portion thereof, to another; (ii) grant an indefeasible interest in the Facilities, or any portion thereof, to another; or (iii) offer to provide capacity in its Facilities to another; provided that, the Permittee at all times retains exclusive control of such Facilities and remains responsible for locating, servicing, repairing, relocating, or removing its Facilities pursuant to the terms and conditions of this Agreement; and provide that, any transferee and/or assignee has a valid Right-of-Way Agreement or Franchise with the City.

Section 27. Notice. Any notice or information required or otherwise provided as between the parties under this Agreement shall be sent to the following addresses unless otherwise specified by the parties:

City:

City of Edmonds  
Director of Community Services  
121 5<sup>th</sup> Avenue N.  
Edmonds, WA 98020

Fax: 425-771-0221

With Copies to:

New Cingular Wireless Lease Administration  
6100 Atlantic Boulevard, 1st Floor  
Mail Code: GAN02  
Norcross, GA 30071



**With Copy to:**

New Cingular Wireless  
2445 140<sup>th</sup> Avenue NE #202  
Bellevue, WA 98005  
Attn: Property Manager

**And With Copy to:**

Counsel – West Region  
New Cingular Wireless  
3345 Michelson Drive, Suite 100  
Irvine, CA 92612

Notice shall be deemed provided upon receipt in the case of personal delivery, three (3) days after deposit in the United States Mail in the case of regular mail, or the next day in the case of overnight delivery.

Section 28. Entire Agreement. This Agreement constitutes the entire understanding and agreement between the parties hereto as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon approval and acceptance of this Agreement.

Section 29. Attorneys Fees. If any suit or other action is instituted in connection with any controversy arising under this Agreement, the prevailing party shall be entitled to recover all of its costs and expenses including such sum as the court may judge reasonable for attorneys' fees, including fees upon appeal of any judgment or ruling.

Section 30. Non-waiver. Failure of the City to declare any such breach or default immediately upon the occurrence thereof, or delay in taking any action in connection therewith, shall not waive such breach or default, but the City shall have the right to declare any such breach or default at any time. Failure of the City to declare one breach or default does not act as a waiver of the City's right to declare another breach or default.

Section 31. Governing Law/Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. The venue and jurisdiction over any dispute related to this Agreement shall be with the Snohomish County Superior Court.

Section 32. Acceptance. Within sixty (60) days after the passage and approval of this ordinance, this Agreement may be accepted by Permittee by its filing with the City Clerk an unconditional written acceptance thereof. Failure of the Permittee to so accept this Agreement within said period of time shall be deemed a rejection thereof, and the rights and privileges herein granted shall, after the expiration of the sixty (60) day period, absolutely cease and determine, unless the time period is extended by ordinance duly passed for that purpose.

Section 33. Effective Date. This ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect five (5) days after the passage and publication of an approved summary thereof consisting of the title.

CITY OF EDMONDS

\_\_\_\_\_  
MAYOR GARY HAAKENSEN

ATTEST/AUTHENTICATED:

\_\_\_\_\_  
CITY CLERK SANDRA S. CHASE

APPROVED AS TO FROM:  
OFFICE OF THE CITY ATTORNEY:

By: \_\_\_\_\_  
W. SCOTT SNYDER

FILED WITH THE CITY CLERK: 02/11/2005  
PASSED BY THE CITY COUNCIL: 02/15/2005  
SIGNED BY THE MAYOR: 02/17/2005  
PUBLISHED: 02/20/2005  
EFFECTIVE DATE: 02/25/2005  
ORDINANCE NO.: 3534

## **SUMMARY ORDINANCE NO. 3534**

of the City of Edmonds, Washington

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On the 15<sup>th</sup> day of February, 2005, the City Council of the City of Edmonds, passed Ordinance No. 3534. A summary of the content of said ordinance, consisting of the title, provides as follows:

AN ORDINANCE OF THE CITY OF EDMONDS, WASHINGTON, GRANTING TO NEW CINGULAR WIRELESS PCS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, A MASTER USE AGREEMENT, TO INSTALL, OPERATE, AND MAINTAIN WIRELESS COMMUNICATION FACILITIES WITHIN A CERTAIN DESIGNATED PUBLIC RIGHT-OF-WAY OF THE CITY OF EDMONDS, STATE OF WASHINGTON, PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS, AND CONDITIONS WITH RESPECT THERETO, AND ESTABLISHING AN EFFECTIVE DATE.

The full text of this Ordinance will be mailed upon request.

DATED this 16th day of February, 2005.

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SANDRA S. CHASE, CITY CLERK